No. 88-149

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SUMMA CORPORATION and WILLIAM R. LUMMIS, Delaware Ancillary Administrator for the Estate of Howard R. Hughes,

Petitioners,

v.

TRANS WORLD AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF IN OPPOSITION OF RESPONDENT TRANS WORLD AIRLINES, INC.

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Questions Presented

Questions 1 and 2 stated by petitioners Summa Corporation, formerly Hughes Tool Company ("Toolco"), and the representative of the estate of Howard R. Hughes ("Hughes") argue that orders of the Civil Aeronautics Board in 1944 and 1950 that approved Toolco's acquisition of control of respondent Trans World Airlines, Inc. ("TWA") and its later increase of that control constitute a bar—"collateral estoppel" (Question 1) or "immunized" (Question 2)—to TWA's Delaware suit in chancery for an accounting based upon the breach by Hughes and Toolco of the fiduciary duty owed by them to TWA and its minority stockholders. The question actually presented is:

> 1. Did § 414 of the Federal Aviation Act, 49 U.S.C. § 1384 (1976) (amended 10 years ago to clarify its intent by striking the phrase upon which the argument for review depends and part of a regulatory scheme administered by a federal agency which went out of existence on January 1, 1985), bar a suit for damages resulting from a breach of fiduciary duty under Delaware law?

The question actually presented by Question 3 stated by Hughes and Toolco is:

> 2. Did the federal judgment that dismissed TWA's antitrust action in 1973 bar TWA from prosecuting its Delaware suit (i) when personal jurisdiction over Hughes could be obtained only in the 1962 Delaware suit, not in the 1961 federal action, and when Hughes and Toolco explicitly acquiesced in the continued pendency of the Delaware suit and (ii) when the Court's 1966 decision in *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), held only that there was no error in the district court's decision there not to dismiss a state law claim although the court had the discretion to do so?

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TO THE SUPREME COURT OF DELAWARE

BRIEF IN OPPOSITION OF RESPONDENT TRANS WORLD AIRLINES, INC.

TWA respectfully submits that a writ of certiorari to review the decisions of the Supreme Court of Delaware, reported at 336 A.2d 572 (1975) and 540 A.2d 403 (1988), should not issue because no question worthy of the exercise of the Court's certiorari jurisdiction is presented and because the decisions are correct.[1]

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1 Pursuant to Rule 28.1 TWA states that it does not have any parent company, any subsidiary that is not wholly owned or any affiliate.

Statement

The petition asks the Court to review a judgment of the Delaware Court of Chancery affirmed unanimously by a panel of the Supreme Court of Delaware for damages of $17,238,366 caused TWA by the breach by Hughes and his instrumentality, Toolco, of their fiduciary duty as controlling persons under Delaware law.[2] The self-dealing between 1955 and 1960 of Hughes and Toolco while they controlled TWA prevented TWA from purchasing an adequate number of jet aircraft on a timely basis and hindered and delayed the conversion of TWA's fleet from piston to jet aircraft.

That Hughes and Toolco were guilty of self-dealing, that they could not prove the intrinsic fairness of their dealings with TWA, that they injured TWA and that the resulting damages found and prejudgment interest awarded are correct are matters conclusively established. The only arguments left to Hughes and Toolco are: (i) that the Delaware courts misconstrued a now repealed federal statutory provision and (ii) that, contrary to *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), the Court should adopt a new rule, to be applied retroactively, that it is a plaintiff's obligation to prosecute its state claim in federal court in all circumstances and even when the defendants have acquiesced in the prosecution of the state claim in the state court.

The Delaware suit

TWA brought this suit against Hughes and Toolco in the Delaware Court of Chancery in April 1962, charging that prior to

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2 In the first paragraph of their statement of questions presented Hughes and Toolco assert that "the Delaware courts have now awarded TWA nearly $50,000,000 in damages" (Pet. i). In fact, the judgment was in the principal amount of $17,238,366 with prejudgment interest of $31,108,234 awarded from January 1, 1960 through entry of judgment in 1987 at an annual rate of 7.32%. Applications for a stay of execution were denied by the Delaware Supreme Court and by Justice Brennan, and the judgment has been paid together with $1,579,525.58 of postjudgment interest on the principal amount of the judgment only, as is Delaware practice.

December 31, 1960, while defendants were in control of TWA,[3] they breached the fiduciary duties they owed to TWA and its minority stockholders by preventing TWA from purchasing jet aircraft (complaint ¶¶ 5, 9, 10, 13, 14, 16-39, 42, 61; 269a *et seq.*).[4] After the Delaware Supreme Court had upheld sequestration of Hughes's stock in Toolco, *Hughes* v. *Trans World Airlines, Inc.*, Del. Supr., 185 A.2d 886 (1962), and the chancery court had denied Hughes's motion to dismiss for failure to state a claim, the Delaware action was informally stayed—at the urging of Hughes and Toolco (20b, 22b)—while the federal action between TWA and Toolco, described below, went forward.

The federal action

On June 30, 1961 TWA had filed an action in the United States District Court for the Southern District of New York charging that Toolco, Hughes and Raymond M. Holliday (a Toolco employee who had been Hughes's chief representative on TWA's board of directors), while in control of TWA, had violated the federal antitrust laws through a course of conduct that included the acts and injuries alleged in TWA's complaint in its later-filed Delaware suit. Hughes was never a party to the federal action since TWA was not able to make service upon him.

In August 1961 Toolco filed a motion to dismiss grounded, *inter alia*, on a claim of immunity from the antitrust laws resulting from orders of the Civil Aeronautics Board ("CAB") approving its control of TWA but did not bring its motion on for decision. Toolco also asserted its immunity claim as an affirmative defense in its answer filed in February 1962. Not

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3 Hughes owned all of the stock of Toolco. By 1942 Toolco owned more than 40% of TWA's common stock and had effective working control. By 1948 and through the 1950s Toolco increased its interest to near 80%. Toolco's control ended in early 1961 when a voting trust became operative, and Toolco sold its TWA stock to the public in 1966 at a profit of near half a billion dollars.

4 References to _____a are to the Appendix to Petition; references to _____b are to the Appendix to Brief in Opposition.

until early 1963 when the district court ordered Toolco to produce Hughes for a deposition did Toolco seek a determination of its CAB immunity motion. The district court denied the motion. 214 F. Supp. 106. Toolco then announced it would not produce Hughes for a deposition, and the district court entered a default judgment against it and at the same time granted certification under 28 U.S.C. § 1292(b) permitting Toolco to seek an interlocutory appeal on its CAB immunity claim. 32 F.R.D. 604.

At a hearing in the Delaware suit on July 10, 1963, after the default judgment had been entered in the federal action, Hughes and Toolco told the chancery court that they could make a motion to dismiss the Delaware suit based on the pendency of the federal action but had decided not to do so. Their counsel stated:

> "But had we taken this step we would have been confronted with a possible inequitable result because while I believe we are entitled to seek an order dismissing this entire proceeding in the light of this final judgment which has been entered in New York, it would be inequitable to do so while there is a possibility of reversal.
>
> "It would require the parties, in the event of a reversal, to start over again. There are statute of limitation questions.
>
> "Therefore we believe that the equitable way of proceeding is to stay all further proceedings here until such time as the time when the Court of Appeals has acted, however it will act, and at that time there may or there may not be some other questions to be litigated, in Delaware or wherever else these parties may choose to go." (21b-22b)

Whether the statement made on behalf of Hughes and Toolco was correct or not is immaterial. What is material is that Hughes and Toolco formally acquiesced on the record before the chancery court in the continued pendency of TWA's Delaware suit.

At the July 10, 1963 hearing TWA's counsel emphasized to the court that Hughes was a party in the Delaware suit only:

> "The only party which is in both actions is the Tool Company. The fact is we couldn't and can't get Hughes individually in New York. The fact is no judgment has been, is being, or will be entered against Hughes individually in New York in any action filed by TWA to date." (23b)

The court of appeals affirmed the district court's denial of Toolco's CAB immunity motion. 332 F.2d 602 (2d Cir. 1964). After briefing and argument this Court dismissed the writ of certiorari as improvidently granted. 380 U.S. 248 (1965). After a two-year damage hearing before a special master, the district court in 1969 entered a judgment awarding TWA damages of more than $45 million before statutory trebling, and the court of appeals again affirmed. 449 F.2d 51 (2d Cir. 1971). The Court then granted certiorari and reversed, ruling that TWA's antitrust claims were barred because the CAB's orders approving Toolco's acquisition and exercise of control of TWA preempted the federal antitrust laws. 409 U.S. 363 (1973).

Defendants' motion to dismiss

After TWA's federal antitrust action was dismissed, Hughes and Toolco moved to dismiss the Delaware suit on grounds of alleged CAB-conferred immunity (arguing that CAB control orders, held by this Court to bar TWA's federal antitrust claims, also immunized them from suit under Delaware law for their breaches of fiduciary duty) and *res judicata* (arguing that TWA had impermissibly split its claim). The chancery court denied the motion. 317 A.2d 114 (1974) (28a *et seq.*). The Delaware Supreme Court affirmed. 336 A.2d 572 (1975) (13a *et seq.*). Hughes and Toolco sought certiorari from the Court on the "splitting" defense alone, and the writ was denied. 423 U.S. 841 (1975).

Hughes and Toolco then filed amended answers which admitted "the well pleaded factual allegations of the Complaint except for allegations of damage to plaintiff and except as the

factual allegations of the Complaint are contradicted by admissions of the plaintiff" (301a, 304a).

The Delaware summary judgment motions

In July 1976[5] Toolco filed a motion for summary judgment, arguing that the CAB had approved the acts of Toolco upon which TWA's damage claims were based and that defendants' admitted conduct did not breach any fiduciary duty they owed to TWA. TWA moved for partial summary judgment as to liability against Hughes and Toolco, relying on their admissions. The motions were briefed, argued and decided together.

The chancery court denied Toolco's motion and granted TWA's motion except in two respects. The chancery court accepted Toolco's arguments that TWA could not pursue either (i) damage claims based upon Toolco's sale or lease of aircraft to air carriers other than TWA, 374 A.2d at 10 (51a), or (ii) claims to Toolco's profits from leasing and selling aircraft to TWA in transactions specifically approved by the CAB. 374 A.2d at 12 (54a). These exceptions apart, the court held that under Delaware law the intrinsic fairness rule and not the business judgment rule applied to the conduct of Hughes and Toolco that prevented TWA from acquiring its own adequate jet fleet and TWA could recover damages for that injury, 374 A.2d at 9-10 (49a-51a), and that their conduct in preventing TWA from acquiring its own adequate jet fleet on a timely basis had not been approved or immunized by the CAB. 374 A.2d at 12 (55a).

The chancery court ruled that under Delaware law Hughes and Toolco had the burden of proving intrinsic fairness and that they had not met it except as to the transactions that had received specific CAB approval. 374 A.2d at 10, 12 (51a, 54a). The court entered an order requiring Hughes and Toolco to account to TWA for any damages it had suffered (61a).

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5 Hughes had died on April 5, 1976, and petitioner Lummis, his Delaware Ancillary Administrator, was substituted for him as a party.

Trial and appeal

After extended discovery by Hughes and Toolco the trial of the accounting of TWA's damages took place over six weeks in April and May 1985. On May 15, 1986 the chancery court handed down its decision awarding TWA $17,238,366 in damages (67a *et seq.*). After further briefing and factual submissions the chancery court on January 21, 1987 awarded TWA prejudgment interest on its damages at a 7.32% annual rate from January 1, 1960 (99a, 114a). Judgment was entered against Hughes and Toolco, jointly and severally, in the principal amount of $17,238,366 plus prejudgment interest of $31,108,234 (115a).

Hughes and Toolco appealed, and the Delaware Supreme Court affirmed the judgment below in all respects. 540 A.2d 403 (1a *et seq.*). As in their petition to this Court, Hughes and Toolco on their appeal below laid their main emphasis upon the argument that orders of the CAB approving Toolco's acquisition of control of TWA and certain specific transactions between Toolco and TWA immunized defendants from any claim at all based on their conduct toward TWA, even conduct that was never put before or approved by the CAB. The Delaware Supreme Court rejected that argument:

> "Because the sales and leases of airplanes between Toolco and TWA were approved by the CAB, the Supreme Court of the United States decided in the federal action that those transactions were exempt from the antitrust laws and 'all other restraints or prohibitions made by, or imposed under, authority of law.' However, as this Court held in *Hughes* v. *Trans World Airlines*, Del. Supr., 336 A.2d 572, 579 (1975), that did not confer a 'blanket immunity' upon the actions of Toolco. Although specific transactions were immunized by CAB authority, Toolco's conduct which was not the subject of CAB review or approval, when taken as a whole, could involve violations of its fiduciary duties to TWA under Delaware law. The Court of Chancery later found such violations to the rights of the TWA minority." 540 A.2d at 406 (6a)

In 1975 the Delaware Supreme Court had rejected that same contention:

> "We deal here with an intra-corporate conflict. The claims are large, the events are dated and complex; but in essence, the contest simply invokes standards of conduct applicable to corporate fiduciaries and litigated over the years in Delaware Courts. Nothing has been called to our attention which persuades us that the Congress intended to preempt State power to regulate such conduct (as part of our 'housekeeping' function, if nothing more) and vest it in the CAB. What remedies would the Board provide? What judgments would it render? What protection would it accord to minority stockholders, and by what process?" 336 A.2d at 579 (24a).

Reasons Why the Writ Should Not Issue

The petition should be denied for the following reasons:

I.A. The Supreme Court of Delaware did not err in its construction of § 414 of the Federal Aviation Act, 49 U.S.C. § 1384 (1976) (the "Act").

1. The Court's 1973 opinion ruled that the CAB's orders approving Toolco's control of TWA and the CAB's power to oversee Toolco's exercise of that control preempted the federal antitrust laws under which TWA had made its federal claim. The arguments of Hughes and Toolco that the Court in 1973 also decided that Hughes and Toolco were immune from suit under the standards of conduct that Delaware applies to corporate fiduciaries and that collateral estoppel binds TWA to that alleged decision have no basis in the Court's 1973 opinion.

2. Then as now the Act emphatically stated in § 1106, 49 U.S.C. app. § 1506 (1982): "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." In 1978, the phrase upon which the petition relies was eliminated from § 414 by the enact-

ment of a bill that "clarifies that Section 414 immunity is limited to the antitrust laws." The amendment echoed the Delaware Supreme Court's statement quoted above that Congress did not intend to preempt "state power to regulate" what was "intra-corporate conflict."

B. If the Supreme Court of Delaware erred in its construction of § 414, it did not do so in conscious defiance of the Supremacy Clause. This Court does not sit to correct error alone, particularly when the statute allegedly misconstrued has been repealed and the construction given it accords with a clarifying amendment.

II.A. The particular circumstances present here make the question based upon the effect of *United Mine Workers* v. *Gibbs* and the principles of *res judicata* not worthy of consideration by the Court.

1. Hughes avoided service of process in the federal antitrust action, and TWA was able to obtain his appearance only in the Delaware suit. For this reason, TWA could prosecute its claim of breach of fiduciary duty against Hughes only in the Delaware chancery court, while TWA could prosecute its claim of violation of the antitrust laws only in the federal court and only against Toolco. A Delaware judgment of joint and several liability could be executed against the property of Hughes. After the Court's decision in *Shaffer* v. *Heitner*, 433 U.S. 186 (1977), which set aside the Delaware sequestration process—the only method by which Hughes could be brought to book—it is improbable that the situation will arise again.

2. Hughes and Toolco explicitly acquiesced in the continued pendency of the Delaware suit on the record before the Delaware chancery court. They may not now claim that the dismissal of the federal action is a bar to the Delaware suit.

B. The Court's 1966 ruling in *Gibbs* that a federal court has the discretionary power to adjudicate a state law claim does not support the argument that TWA's 1961 federal antitrust action and TWA's 1962 Delaware suit constitute impermissible "claim-splitting." The state court and court of appeals deci-

sions relied on in the petition did not involve situations where, as here, it was impossible to obtain personal jurisdiction over a defendant in the federal action.

ARGUMENT

I.

THE 1975 AND 1988 DECISIONS OF THE DELAWARE SUPREME COURT CONCERNING SECTION 414 DO NOT PRESENT A QUESTION WARRANTING REVIEW AND ARE CORRECT.

Hughes and Toolco argue under both point I and point II of their petition that Hughes and Toolco cannot be held accountable in damages for any injury they inflicted upon TWA and its minority stockholders after the CAB approved Toolco's control of TWA, although the CAB neither approved nor was aware of the fact that Hughes and Toolco were violating Delaware law regulating the conduct of corporate fiduciaries.[6] In a revealing phrase Hughes and Toolco assert that they were "immunized from suit" (Pet. 3). Although they make their argument twice under purportedly distinct headings of "collateral estoppel" and "CAB immunity," it is one and the same.

The global immunity argument does not present a question warranting review. There is no basis for the global immunity argument in the Court's 1973 opinion holding that the CAB's orders preempted the federal antitrust laws.

A. No Question Warranting Review Is Presented.

Hughes and Toolco argue that the Delaware Supreme Court in its 1975 and 1988 decisions misconstrued the phrase "all

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6 Throughout the petition, the arguments of Hughes are made *sub silentio* since the opening three words of the petition under "Question Presented"—"Petitioners (collectively 'Toolco')" (Pet. i)—ignore the fact that the judgment below is joint and several and attempt to define Hughes out of the Court's consciousness. Hughes was a party in the Delaware action only, never in the federal action.

other restraints or prohibitions made by, or imposed under, authority of law" in § 414 of the Act. The argument is wrong but, if it were right, the purported error does not warrant review.

The phrase, never adverted to in the text of the Court's 1973 opinion that addressed only preemption of the antitrust laws, was stricken from the Act in 1978. The regulatory scheme of the Act changed substantially with enactment of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, and the agency that administered the former scheme came to an end on January 1, 1985.

The correctness *vel non* of the Delaware Supreme Court's decisions is of interest only to Hughes and Toolco and to TWA—to the outcome of one litigation only. The exercise of the Court's certiorari jurisdiction would be inappropriate.

B. The Decisions Are Correct.

Hughes and Toolco were not globally "immunized from suit" either by the Court's 1973 decision or by § 414 itself.

1. There was no collateral estoppel.

The collateral estoppel argument is rhetoric intended to bolster the "immunity from suit" contention by iteration. The argument assumes an interpretation as to the reach of § 414 of the Act that this Court did not make and had no occasion to make in its 1973 opinion.

Section 414 formerly provided:

> "Any person affected by any order made under [§ 408 of the Act] . . . shall be, and is hereby, relieved from the operations of the 'antitrust laws,' as designated in [15 U.S.C. § 12], and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

The Court's 1973 opinion ruled that the CAB's orders approving Toolco's control of TWA and the CAB's power to

oversee Toolco's exercise of that control preempted the federal antitrust laws.

> "Competition and monopoly—two ingredients of the antitrust laws—are thus standards governing the CAB's exercise of authority in granting, allowing, or expanding or contracting the control which Toolco had over TWA by reason of the various orders issued by the CAB under § 408. In this context, the authority of the Board to grant the power to 'control' and to investigate and alter the manner in which that 'control' is exercised leads us to conclude that this phase of CAB jurisdiction, like the one in the *Pan American* [*World Airways* v. *United States*, 371 U.S. 296 (1963)] case, pre-empts the antitrust field." 409 U.S. at 385 (footnotes omitted).

The truncated quotations from the Court's 1973 opinion that Hughes and Toolco set out (*e.g.*, Pet. 15-16) excise the words that limited the Court's holding to preemption of the federal antitrust laws.[7]

In its 1975 decision construing the Court's 1973 opinion the Delaware Supreme Court correctly concluded that "the Court considered the controversy only and entirely in the context of the Federal anti-trust statutes" and "the Court disposed of the litigation entirely on the basis of anti-trust principles, statutory and decisional." 336 A.2d at 574, 575 (16a).

The Court's 1973 opinion did not speak to any variety of preemption except preemption of the federal antitrust laws. The

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7 The sentence that precedes the quotation at p. 15 of the petition states:

> "We think the Court of Appeals erred also in construing § 414, which immunizes from antitrust liability any conduct approved, authorized, or required by any Board order issued under § 408." 409 U.S. at 386.

Missing from the fragmentary quotations at p. 16 of the petition are references to "a derivative antitrust suit" and to "TWA's suit in 1961" which was ordered dismissed precisely because it was an antitrust suit. 409 U.S. at 388. Other references in the opinion emphasizing that it dealt with preemption of the antitrust laws only can be found in 409 U.S. at 364, 366, 369, 384, 385, 387, 389.

Court did not consider what Congress intended by the provision in § 414 which refers to "all other restraints or prohibitions made by, or imposed under, authority of law." Certainly the opinion did not construe that language against the equally emphatic language of § 1106 of the Act, which provided then and still provides:

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

Hughes and Toolco attempt to suggest that there were specific rulings on damage claims in the Court's 1973 opinion that would preclude TWA's damage judgment below (Pet. 16-18). The attempt is mistaken. When the Court decided that TWA's antitrust claims were wholly preempted by the CAB's "authority . . . to grant the power to 'control' and to investigate and alter the manner in which that 'control' is exercised," 409 U.S. at 385, it reversed TWA's judgment for damages and directed that its complaint be dismissed. Nothing in the 1973 opinion suggests a determination that particular damage claims had been rejected for any reason but that TWA's entire antitrust action was preempted.

2. There was no statutory immunity.

The Delaware courts have awarded TWA damages for the injuries it suffered when Hughes and Toolco engaged in self-dealing while they controlled it. Those damages were awarded after Hughes and Toolco failed to prove, as Delaware law says they must, that their self-dealing transactions were "intrinsically fair" to TWA and its minority stockholders.

Hughes and Toolco argue that Delaware has impermissibly "sought through a fiduciary action to exercise 'divided authority' over the Toolco-TWA control relationship by substituting Delaware determinations for determinations by the CAB that Toolco's control of TWA was in the public interest and on just and reasonable terms" (Pet. 19-20). Their argument ignores the

facts of this case. Hughes and Toolco were controlling persons and have been found to have cheated the corporation they controlled and its minority stockholders. TWA is a Delaware corporation, as is Toolco. TWA went to the Court of Chancery of Delaware to obtain restitution of what it had been deprived by Hughes and Toolco.

Hughes and Toolco argue that "[i]n section 414, Congress expressly addressed the preemptive effects of CAB control orders, providing that *no* 'restraints or prohibitions' were to impede effectuation of what the CAB had approved" (Pet. 19). The preemption of the antitrust laws that doomed TWA's antitrust action flowed from the CAB's approval of Toolco's *control* of TWA, not from its approval of any specific transaction between Toolco and TWA. The Court's decision does not refer to CAB approval of the particular transactions upon which TWA's antitrust damage claims depended.

The attempt by Hughes and Toolco to argue what Congress must have intended by § 414 (Pet. 20) is particularly inappropriate. Congress amended § 414 in 1978 to eliminate the reference to "all other restraints or prohibitions made by, or imposed under, authority of law" on which Hughes and Toolco rely. Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 30(a), 92 Stat. 1705, 1731. After that amendment § 414 provided:

> "In any order made under [§ 408 of the Act] . . . the Board may, as part of such order, exempt any person affected by such order from the operations of the 'antitrust laws' set forth in [15 U.S.C. § 12(a)] to the extent necessary to enable such person to proceed with the transaction specifically approved by the Board in such order and those transactions necessarily contemplated by such order, except that the Board may not exempt such person unless it determines that such exemption is required in the public interest." 49 U.S.C. app. § 1384 (1982).[8]

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8 Additional language, not pertinent here, was added to § 414 by the International Air Transportation Competition Act of 1979, Pub. L. 96-192, § 27, 94 Stat. 35, 47.

H.R. Rep. No. 1211, 95th Cong., 2d Sess. 18 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 3737, 3754, explained the purpose of the amendment as follows:

> "Section 414 of the Federal Aviation Act grants immunity from the antitrust laws and other laws for transactions or relationships that have received Board approval pursuant to other provisions of the act.
>
> "Section 414 has been interpreted to give antitrust immunity far beyond the scope intended by the Board. For example, in *Hughes Tool Company* v. *Trans World Airlines*, 409 U.S. 363, 1973), the Supreme Court held, despite CAB disclaimers, that a broad course of conduct allegedly violating the antitrust laws had been immunized as a result of CAB orders approving certain limited transactions.
>
> "H.R. 12611 limits section 414 immunity in several respects. *First, the bill clarifies that section 414 immunity is limited to the antitrust laws*. Second, the bill provides that immunity shall be granted only insofar as is necessary to permit completion of transactions specifically approved by the Board, or transactions necessarily contemplated by a Board order. Third, the bill provides that the grant of antitrust immunity is discretionary with the Board and that the Board in granting immunity must find the grant to be in the public interest." (Emphasis added)

The House-Senate Conference Committee adopted the language of the House bill and the explanation in the House Report. H.R. Conf. Rep. No. 1779, 95th Cong., 2d Sess. 78 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 3773, 3792.

Neither here nor below have Hughes and Toolco ever explained why the extraordinary result they are seeking makes sense. Why should the fact that a federal regulatory agency had oversight over the Toolco/TWA control relationship preempt Delaware law and immunize self-dealing by Hughes and Toolco

when the CAB never approved or considered the particular acts of self-dealing? As the Delaware Supreme Court said in 1975:

> "What remedies would the Board provide? What judgments would it render? What protection would it accord to minority stockholders, and by what process?" 336 A.2d at 579 (24a).

As the Court observed in *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984), when it refused to preempt state law remedies for injuries resulting from safety violations even where safety regulation was exclusively a federal concern:

> "[T]here is no indication that Congress even seriously considered precluding the use of such remedies either when it enacted the Atomic Energy Act in 1954 or when it amended it in 1959. This silence takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct. It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."

The Court has emphasized that a federal statutory scheme will be held to preempt state regulation—and especially state regulation of the governance of corporations which are creatures of state law—only

> " 'where compliance with both federal and state regulations is a physical impossibility . . . ,' *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963), or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941) . . . ." *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978).

The Court repeated this language in *CTS Corp.* v. *Dynamics Corp. of America*, 107 S. Ct. 1637, 1644, 1648 (1987) ("The longstanding prevalence of state regulation in this area suggests that, if Congress had intended to pre-empt all state laws that

delay the acquisition of voting control following a tender offer, it would have said so explicitly"); *accord Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 479 (1977) ("Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden"). *See also Louisiana Public Service Commission* v. *FCC*, 476 U.S. 355, 368-70 (1986); *Burks* v. *Lasker*, 441 U.S. 471, 478-80 (1979). In *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 299, 300 (1976), the Court concluded that "we are not faced with an irreconcilable conflict between the statutory scheme and the persistence of common-law remedies" and ruled that a state tort claim for fraudulent misrepresentation in connection with the "bumping" of an airline passenger who held a valid reservation could proceed because "the common-law action and the statute are not 'absolutely inconsistent' and may coexist, as contemplated by § 1106 [of the Act]."

Like the situations that were the subjects of these decisions TWA's Delaware suit did not present any irreconcilable conflict between state and federal regulatory schemes. The reliance placed by Hughes and Toolco upon *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 108 S. Ct. 2428 (1988), and *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986), is inexplicable. In each of those cases the petitioners were faced with an order of the Federal Energy Regulatory Commission resulting in one rate while a state public utility commission was permitted to make determinations that would result in another and conflicting rate. *Seaboard Air Line R.R.* v. *Daniel*, 333 U.S. 118 (1948), is no more apposite, for it involved an express order of the Interstate Commerce Commission that South Carolina sought to countermand.

There is no hint of any such conflict between the federal regulatory scheme and Delaware law governing the relationship between corporate fiduciaries and their *cestui que trust*. Immunizing the misconduct of Hughes and Toolco would allow these admitted wrongdoers to avoid responsibility for what they have done—nothing more.

II.

THE DISMISSAL OF TWA'S ANTITRUST CLAIM DOES NOT PRECLUDE TWA'S DELAWARE CLAIM AGAINST HUGHES AND TOOLCO.

Hughes and Toolco contend that TWA impermissibly split its claim against both of them because it did not assert in its federal action against Toolco in 1961 the Delaware state law claim that it brought in Delaware chancery court against both Hughes and Toolco in 1962. Their contention assumes that TWA was bound to anticipate the Court's 1966 decision in *United Mine Workers* v. *Gibbs* and the later rulings, principally of state courts (Pet. 24n.36 and 25n.37), that would turn *Gibbs*'s "doctrine of discretion" under which "[n]eedless decisions of state law should be avoided," 383 U.S. at 726, into what amounts to compulsory pendent pleading—an inescapable obligation that plaintiff must plead the state law claim, whatever its nature and whatever the other pertinent circumstances, in the federal court along with the federal claim. The Court denied certiorari in 1975 when Hughes and Toolco made the same contention. 423 U.S. 841.

A. No Question Warranting Review Is Presented in the Circumstances.

Whether or not to consider the "compulsory pendent pleading" concept that defendants urge may be left by the Court to an appropriate case. The facts here preclude the argument that TWA split a single claim (i) because the Delaware state law claim of breach of fiduciary duty could only be and was litigated against Hughes in the Delaware chancery court and (ii) because Hughes and Toolco acquiesced in any splitting that occurred.

1. Hughes and Toolco acquiesced in the continued pendency of the Delaware suit from 1963 until 1973.

In arguing the general principles of *res judicata* or claim splitting, it is not helpful to rely upon statements of general princi-

ples taken from the opening words of opinions that turn on particular facts. For example, the words Hughes and Toolco quote from *Brown* v. *Felsen*, 442 U.S. 127 (1979) (Pet. 22), hardly forecast the Court's unanimous holding that, because "res judicata shields the fraud and the cheat as well as the honest person" and "is to be invoked only after careful inquiry [,]. . . neither the interests served by res judicata, the process of orderly adjudication in state courts, nor the policies of the Bankruptcy Act would be well served by foreclosing petitioner from submitting additional evidence to prove his case." 442 U.S. at 132.

The Restatement (Second) of Judgments (1982) states an apt exception to the rule for which Hughes and Toolco contend:

> "§ 26. Exceptions to the General Rule Concerning Splitting
>
> "(1) When any of the following circumstances exists, the general rule of § 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:
>
> "(a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein . . . ."

TWA filed an antitrust complaint against Toolco in federal court in 1961, and Toolco answered in February 1962, asserting its CAB immunity defense; TWA could not effect service upon Hughes in the federal action. TWA filed its Delaware action against Toolco and Hughes in April 1962, obtaining personal jurisdiction over both. Toolco answered but did not assert an affirmative defense of prior pending action or take any other steps to keep the two actions from proceeding concurrently. In February 1963 Toolco defaulted in the federal action but obtained an interlocutory appeal of the district court's decision rejecting its CAB immunity defense.

In July 1963 when Toolco's CAB immunity defense was scheduled to go before the court of appeals, Hughes and Toolco told the Delaware chancery court that, although they believed

they could move to dismiss the Delaware suit based on the pendency of the federal action, they had decided not to do so (*see* p. 4, *supra*). Not until the Court decided almost a decade later that Toolco's motion asserting its CAB immunity defense to TWA's antitrust claims should have been granted in the first instance did Hughes and Toolco argue that TWA had split its claim.

As the Delaware Supreme Court recognized in 1975, 336 A.2d at 578 (22a), Toolco's choice not to assert "splitting" for more than a decade while each case continued pending in a different court is plainly acquiescence within the meaning of § 26(1)(a) of the Restatement (Second) of Judgments. *Kern Oil & Refining Co.* v. *Tenneco Oil Co.*, 840 F.2d 730, 735 (9th Cir. 1988) ("Tenneco, by never objecting to separate trials of the price and supply cases, cannot now object to their being split") (footnote omitted); *Shaw* v. *Chell*, 176 Ohio St. 375, 199 N.E.2d 869, 874 (1964) (defendant consents to splitting cause of action when he withholds objection until judgment is entered in one of two pending actions); *Todd* v. *Central Petroleum Co.*, 155 Kan. 249, 124 P.2d 704, 707 (1942) (one who seeks the benefit of the splitting rule "must claim its benefit on the institution of a second or unnecessary action at an early stage of the proceedings, otherwise he will waive his right to its benefit"); *Georgia Ry. & Power Co.* v. *Endsley*, 167 Ga. 439, 145 S.E. 851, 855 (1928) ("It was too late for the defendant to object to the splitting of the action into two suits after judgment had been rendered against it in one of them"). *See also Rennie* v. *Freeway Transport*, 294 Or. 319, 656 P.2d 919, 924 (1982) ("a defendant is free to waive the right to a combined action and the parties are competent to agree mutually to the splitting and separate litigation of the various aspects of a plaintiff's claim") (cited at Pet. 24, 25, 27).[9]

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9 In the *Rennie* case the court ruled that defendants had not acquiesced in plaintiff's claim-splitting because they had moved to dismiss or abate the prior-pending federal case immediately after the complaint in the state action was filed. 656 P.2d at 924-25.

2. If the timing had been different, the result would be the same, and Hughes and Toolco would have no argument.

If in 1961 TWA had foreseen *Gibbs* and the subsequent misreading of *Gibbs* discussed below, TWA might have appended its Delaware claim against Toolco to its antitrust claim against Toolco. We say "might" because TWA was able to obtain Hughes's appearance only in the Delaware chancery court.[10]

The district court's denial of Toolco's motion to dismiss based on its claim of immunity by reason of the CAB orders was affirmed by the court of appeals in 1964. The Court in 1965 (at TWA's suggestion) dismissed the writ of certiorari to review that decision as improvidently granted. If instead the Court had made then the ruling it made in 1973, TWA's federal claim would have been dismissed before any trial and the appended Delaware claim would have been dismissed as well. *Gibbs*, 383 U.S. at 726. TWA would have instituted (or revived) the Delaware suit and by hypothesis the judgment that Hughes and Toolco wish the Court to review would have been reached without, however, any possible basis for a claim of *res judicata* as to the Delaware claim by reason of the dismissal of the federal claim.

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10 The arguments that led the Court to abandon the requirement of mutuality of parties for collateral estoppel (or issue preclusion), *see Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), do not apply to claim preclusion—especially when the party seeking to assert claim preclusion was not subject to personal jurisdiction in the prior action on which the asserted preclusion is based. The rules against splitting a claim apply only between parties. *Hecht* v. *City of New York*, 60 N.Y.2d 57, 62, 454 N.E.2d 527, 530, 467 N.Y.S.2d 187, 190 (1983) ("a judgment for or against one tort-feasor does not operate as a merger or bar of a claim against other tort-feasors"); Restatement (Second) of Judgments § 49 (1982) ("A judgment against one person liable for a loss does not terminate a claim that the injured party may have against another person who may be liable therefor").

B. The Doctrine of "Compulsory Pendent Pleading" Cannot Apply.

Perhaps the plainest statement of the theory of compulsory pendent pleading appears at Restatement (Second) of Judgments, § 25, Comment e:

> "e. *State and federal theories or grounds.* A given claim may find support in theories or grounds arising from both state and federal law. When the plaintiff brings an action on the claim in a court, either state or federal, in which there is no jurisdictional obstacle to his advancing both theories or grounds, but he presents only one of them, and judgment is entered with respect to it, he may not maintain a second action in which he tenders the other theory or ground. If however, the court in the first action would clearly not have had jurisdiction to entertain the omitted theory or ground (or, having jurisdiction, would clearly have declined to exercise it as a matter of discretion), then a second action in a competent court presenting the omitted theory or ground should be held not precluded."

This Comment, like all but one of the cases on which Hughes and Toolco rely in contending for compulsory pendent pleading (Pet. 24n.36 and 25n.37),[11] depends upon *United Mine Workers*

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11 Most of the post-*Gibbs* cases that Hughes and Toolco depend upon involve a second lawsuit against the same defendant or defendants after judgment was entered against plaintiff in his first lawsuit. The defendants in the two cases involving concurrent, not consecutive, lawsuits did not acquiesce in the pendency of the second suit. *Rennie* v. *Freeway Transport*, *supra*, 656 P.2d at 924-25; *Juneau Square Corp.* v. *First Wisconsin National Bank*, 122 Wis. 2d 673, 364 N.W.2d 164, 171 (Ct. App. 1985) (prior pending action pleaded as a defense).

The one pre-*Gibbs* case, *McCann* v. *Whitney*, 25 N.Y.S.2d 354, 354-55 (Sup. Ct. N.Y. Co. 1941), is a trial court decision granting summary judgment dismissing a state antitrust law claim "based upon the same allegedly wrongful and unlawful acts, in which final judgments have been entered in favor of the defendants" in two prior federal antitrust actions brought successively against the same defendants in federal district court.

v. *Gibbs* and is not fairly applicable to a pre-*Gibbs* case like this.[12]

The fundamental difficulty with the Restatement's Comment and the decisions upon which Hughes and Toolco rely is that they extend the *Gibbs* ruling as to the scope of federal "judicial power," 383 U.S. at 725, into a rule of preclusion of a state claim that is materially different from the federal claim. The *Gibbs* opinion stressed that the exercise of pendent jurisdiction is discretionary.

> "That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them, *Erie R. Co.* v. *Tompkins*, 304 U.S. 64. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." 383 U.S. at 726 (footnotes omitted).

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12 According to 13B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3567, at 112 (1984), *Gibbs* "changed the law in this area so significantly that pre-1966 cases are now of historical interest only" (footnote omitted). Before 1966 the scope of pendent jurisdiction was defined by *Hurn* v. *Oursler*, 289 U.S. 238 (1933). Under that case the basic criterion for a federal court's exercising pendent jurisdiction over a common law claim was not commonality or identity of facts with the federal claim but whether plaintiff was suing for violation of a single right and was thus asserting a single "cause of action." If separate rights were involved—even though the conduct complained of was the same—there were separate causes of action, and the non-federal claim had to be dismissed. 289 U.S. at 248. Applying the *Hurn* test, the conduct of Hughes and Toolco invaded two separate rights of TWA—the right to be free from unfaithful dealing by a fiduciary and the right to be free from an unlawful restraint of trade.

In any event, the test set out in the Comment is whether the federal court would have declined to entertain TWA's Delaware state law claims. The district court's May 23, 1973 opinion when it entered the judgment dismissing TWA's antitrust complaint stated that, while the dismissal was on the merits with respect to the federal claims, "it does not follow that such a dismissal would be a bar to the nonfederal claims," citing a case in which pendent non-federal claims were dismissed before trial along with the antitrust claims that made it a federal case. 359 F. Supp. 783, 785 (119a).[13] If speculation were required, the only appropriate conclusion is that the district court would not have entertained the Delaware claims on which TWA's judgment is grounded.

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13 *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1297 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972) ("Since the federally-based claims were properly dismissed prior to trial, however, the pendent state claims must also be dismissed and the plaintiff relegated to the state courts for relief").

CONCLUSION

For the foregoing reasons the writ of certiorari should not issue.

Respectfully submitted,

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August 26, 1988

APPENDIX TO BRIEF IN OPPOSITION

Transcript of Proceedings at Hearing on July 10, 1963

IN THE

COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Civil Action No. 1607

TRANS WORLD AIRLINES, INC.,

Plaintiff,

vs.

HUGHES TOOL COMPANY, *et al.*,

Defendants,

and

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, METROPOLITAN LIFE INSURANCE COMPANY, IRVING TRUST COMPANY, DILLON, READ & CO., INC., JAMES F. OATES, JR., HARRY C. HAGERTY, BEN-FLEMING SESSEL, ERNEST R. BREECH, and CHARLES C. TILLINGHAST, JR.,

Additional Defendants on Counterclaims.

County Court House
Wilmington, Delaware
July 10, 1963
2:30 P.M., E.D.S.T.

Before:

HONORABLE WILLIAM MARVEL,

Vice Chancellor.

[Appearances]

• • •

Transcript of Proceedings at Hearing on July 10, 1963

[2] • • •

The Court: • • •

Mr. Finger, I think you arranged this hearing.

Mr. Finger: This hearing is upon the order to be entered upon your Honor's opinion of June 7, 1963. On a prior occasion we appeared before your Honor and submitted a draft of order, and by agreement the matter was put off until today.

We desire to renew our request for an order on that opinion, and the form of the order that we present is the one which during the informal conference in Chambers we presented, and copies of which were handed to other counsel.

I now present the same form of order. The only change is that the earlier draft spoke of June; this speaks of July. The only other change is in the date near the end of the order, about five lines from the bottom, where we have substituted July for June.

[3] This form of order in paragraph 4 contains provisions with respect to the taking of depositions. Since that time there has been served upon us a motion to stay with respect to the taking of depositions, and I presume that both matters should be considered together. The decision on the motion to stay presumably will govern the form of the order.

That is to say, if the stay is granted, then there will be a substanial change in the last paragraph of our form of order. If the stay is not granted, then we presume that the order in the form that we present it would still be in order.

It would be my suggestion, subject to your Honor's approval, that since the matter of the stay enters into the matter of the form of order, that perhaps we should hear from the attorney for Hughes and Hughes Tool Company

on their motion for stay and the position of the respective parties with respect to that application.

The Court: Mr. Tunnell.

Mr. Tunnell: May it please the court, from the very institution of the action in this court it has been affirmed by the plaintiff and acknowledged by the defendants that all of the acts complained of in the complaint as filed in this court are included within the sweep and scope of the [4] complaint that has been filed in New York.

We have at various times discussed the reason why the Delaware action was filed, but whatever the reason may have been initially it must be clear to all of us that the time is bound to come when it will be impossible for the plaintiff to get judgment in both of these cases.

The relief cannot be thus duplicated, or quadrupled in this case, because, as your Honor will recall, there is a prayer for treble damages in connection with the New York suit.

It seems perfectly apparent to us that at some stage, one case or the other will have to come to a standstill.

Since we were before your Honor on the last occasion, Judge Metzner has taken actions which we talked about as a possibility and a likelihood at the time of our previous argument. But what we only thought about as a future action at that time has now become a reality. Judge Metzner has dismissed with prejudice five counterclaims, given summary judgment with respect to one, and has given judgment with respect to the complaint, and has asked that the damage hearing be commenced.

Following his decision of the merits and setting down the matter of damages for hearing, appeal has been [5] noticed and the appeal has been received and will be entertained by the Circuit Court of Appeals.

I don't know just how far this court means to permit counsel to travel in parallel roads, but we want your Honor on this occasion very seriously to think, as we represent to the court, that this is probably the time in which to suspend proceedings in this case pending the determination by the Circuit Court of Appeals for the Second Circuit of the validity of the judgments which Judge Metzner has entered.

There are many things that could be said to elaborate upon this application. I could not say them under any circumstances any better than they are said in the affidavit of Mr. Davis which is attached to the motion which I am now speaking to, your Honor. I don't know if the court has had an opportunity to study the facts set forth in that affidavit but they are the facts which I have just, with a broad brush, now outlined.

So we say to the court that it seems to us that it would be an unnecessary duplication of the effort of all concerned to go forward now when apparently the case is in the form of final judgment, and there it will remain unless of course the judgments of the trial court are reversed, or amended in some substantial fashion.

[6] Therefore, we respectfully ask your Honor to enter an order at this time staying any further proceedings in this case.

We find ourselves at this moment in agreement with what I took to be a feeling on the part of Mr. Finger when he waved us to the lectern. It seems to us that for the court now to enter an order would perhaps defeat, to some extent, the purpose of this application for stay because your Honor would, by entering an order in the form that either of us has suggested, start the time running for an appeal, which

again seems to us to fall upon all the parties and counsel for all the parties, and some court, to do a lot of work which is really unnecessary.

So we respectfully ask your Honor to consider the substance of the affidavit and the prayer of the motion.

The Court: Mr. Tunnell, is there any kind of order that should be entered? You say no order is required.

Mr. Tunnell: I'm sorry, your Honor, that was too broad a statement. There is certainly an order to be entered. It seems to me that an appropriate order would be that the motion for a general stay, which is here presented, should be granted, and in the meantime no further orders will be undertaken in this court.

Now, your Honor's opinion is on file and the force [7] of it will not be lost or deteriorate. It will only be put in a posture where work must be done with respect to it if it is implemented in the form of an order as the court thought appropriate under the facts as they stood at the time the memorandum opinion came down.

But we think, and respectfully submit to your Honor, that the facts which were then before your Honor have now been amplified in a significant way. So we think there should be just a simple general order of stay pending the outcome of these appellate proceedings.

The Court: In other words, any other kind of order dealing with the matters sought to be decided in the opinion would set time running as to responsive pleadings, depositions, and so on?

Mr. Tunnell: Yes, and that we would ask your Honor not to do. But all counsel and the court will remember the posture of the matter, and if the case should take the turn that made it wise, and to your Honor apparently just, for

these proceedings to resume, I suppose that is precisely at the point where they would resume.

• • •

[8] • • •

The Court: Yes. Your thought is that not to have a stay now might lead to duplication of work?

Mr. Tunnell: Yes, your Honor, it would. For instance, these depositions are very frankly mentioned. There needs to be a reply to counterclaims here, counterclaims similar to those that have been dismissed with prejudice in New York. There would have to be a reply.

They want to take depositions with respect to the counterclaims. That is illustrative of the type of thing that is going to have to be undertaken unless the case is stayed.

The Court: I gather that the appeal is being accelerated in some way—I don't know how successful you have been on that—but if you and your associates are successful, a reversal might mean that this whole very bitterly contested litigation might go before the Civil Aeronautics Board in the first instance.

Mr. Tunnell: That is one possibility, your Honor.

The Court : Well, that is what you would hope for, I gather.

Mr. Tunnell: Yes, sir.

The Court: Very well, Mr. Sonnett.

[9] I might say, perhaps in fairness to myself, that I came in here expecting to have an order presented. I was not aware of the fact that a motion for stay was in the file.

Mr. Sonnett: Nor were we, your Honor, until it was belatedly received just a few days ago.

The Court: It was filed July 8. It was served starting on the 5th, I guess.

Mr. Sonnett: However, I don't press the point, your Honor, about the late service because I think this is the time to make a disposition of the matter which has been before you several times before.

• • •

[10] • • •

In respect of the motion for a stay, your Honor, I think a short and simple answer to it is that Mr. Hughes, who is by all accounts the principal actor in all of these events, is not a defendant in the New York case. Although we spent many thousands of dollars trying to bring about that happy result, we never could find him and serve him with process, and he has not seen fit to appear in the New York litigation.

So that we have in New York, Toolco on the one hand, which as your Honor knows is 100% owned by Hughes, but we don't have Mr. Hughes.

We also have in the New York case Mr. Holliday, who is the chief executive officer under Mr. Hughes controlling the activities of the Tool Company. We do not have Mr. Holliday as a defendant in the Delaware case.

In the Delaware case we now, after strenuous efforts and by reason of decisions of this court, have Mr. Hughes before this court as an individual defendant. This is the only court in which he is a defendant, and it [11] is to the orders of this court, and this court alone, that he will respond if he responds to the orders of any court.

The prayer for relief in this case, as your Honor will recall, seeks a very significant—indeed, essentially equitable—relief against Hughes and the Tool Company, in addition to damages. We cannot get that equitable relief

against Howard R. Hughes individually any place in the world except from your Honor, and we think in due course that we are going to prove to your satisfaction that we are entitled to it, we need it, and that we should have it.

So that what the motion for a stay comes down to, I respectfully submit, is another effort—and there have been many, many efforts before—to keep Hughes beyond the reach of any court. It's that simple.

I think, therefore, your Honor should, in the exercise of your sound discretion and judgment, deny the motion for a stay on that ground alone.

As to the form of an order to be entered on your Honor's last decision, we think the form of order which we have submitted is for the reasons set forth in my affidavit served and submitted today, the appropriate form. Our form of order, your Honor, is identical with the form of order submitted by the Tool Company with the exception that we, in our form of order, have contained the provisions [12] in paragraph 1 for the service of an answer by Hughes.

May we hand up the affidavit, your Honor, to which I referred, and serve copies.

We have in paragraph 3 provision for the service of a reply by TWA to the counterclaims of Toolco, and we have in paragraph 4 a provision which we think suitable, subject to your Honor's selection of a date, with respect to the depositions which have been noticed to be taken by the additional defendants, and in which TWA will participate when, as and if the deposition of Hughes is taken pursuant to those notices.

In summary, your Honor, therefore, I see nothing before your Honor which would warrant indefinitely delay-

ing this case because of the New York case, on the one ground alone that Hughes is not in the New York case and that he is an essential defendant in this case, and on the further ground that your Honor has pointed out, that the well settled policy of this court is against staying the hand of this court in matters over which it has jurisdiction because there may be some other, somewhat related, litigation elsewhere.

We don't know when the New York case will be disposed of. It may be November, it may be December, it may be next year. We just don't know. Were your Honor [13] therefore to grant the stay they seek, it would mean that this court would be paralyzed in this case, I would suggest, for at least six months.

This is the kind of result Hughes has sought individually to achieve by evading process in the New York case and by delaying, until he was dragged in by the heels, his appearance in this case.

Thank you.

Mr. Tunnell: If the court please, may we have five minutes or so to read this paper? We haven't seen it before, and while we have had five minutes we did have to listen to Mr. Sonnett.

The Court: I will take a recess for five or ten minutes and read it myself.

(Brief recess.)

• • •

[25] Mr. Tunnell: May it please your Honor, I want to speak briefly, and then I would like to ask your Honor to hear Mr. Davis on behalf of our clients.

Our friends, with laudable unanimity, concur in everything they ask. They concur that nothing has happened

that wasn't predicted the last time we were before your Honor, and indicate that therefore there isn't really much significance to it. It simply means we are repeating everything that we said before and your Honor ruled upon before.

There is perhaps no better way for us to emphasize the importance of what has happened since, and that we are not repeating what we said before but are relying upon what happened since, then to talk a little bit about this case of Chadwick against Parkhill, which illustrates the significant point as we see it.

Incidentally, that case is reported as Chadwick against Gill in 141 Atlantic page 618, but that is the Parkhill case.

The Court: It is also in 16 Delaware Chancery 127. There are several opinions. That is the one on the motion to stay?

Mr. Tunnell: Yes, your Honor, and that is the one that I cited to the court in 141 Atlantic, the stay order.

[26] Your Honor may have just read the case, in which case I will try to be very quick indeed, but I did have to say a little something in fairness to any of our adversaries who may not have the book in front of them at the moment.

Chadwick filed suit in the King's Bench Division in the High Court of Justice in England, and then subsequently filed a similar action in the Court of Chancery of this State, in this court, as a matter of fact. Gill moved to stay the proceedings in the Court of Chancery of the State of Delaware on the ground that the action in England had been filed before the one in Delaware was, but, as Chancellor Wolcott pointed out, he did not rely upon or point out to the court any particular equity, I suppose, of op-

pressiveness or any of the things that the Chancellor specifically cited. He merely said there is a prior action pending over in England, so I want this one stayed.

Chancellor Wolcott then decided, incidentally, not that he couldn't have stayed it but that he needn't stay it, and in the absence of equity would not stay it on that ground.

He then concluded his comments, after having written a brief opinion on the fact that he wasn't compelled to stay it in those circumstances, by this dictum, which is the last thing he said in the opinion:

> [27] "Of course, if the prior suit had proceeded to judgment, the court rendering it having jurisdiction, the later suit must end."

Your Honor will recall that this suit was the second one filed. The prior suit—take the counterclaims which I cited to your Honor a while ago, the counterclaims in New York. They have proceeded to judgment and for whatever meaning and effect it has, they have proceeded to judgment with prejudice.

Now our friends stand before your Honor today and say, "Oh, there is nothing changed." Well, first of all a judgment was entered, which Chancellor Wolcott thought would have dramatic consequences. That was not the fact when we stood before your Honor before. True enough, it was anticipated, but the juridical effect of that anticipation is certainly different from the juridical effect of a judgment.

It appears to us that had Chancellor Wolcott had this matter before him and been in the same mood that he was when he wrote this opinion, the mood being induced by the equities that he heard in this case—I don't mean

anything else there—he would have felt that the entry of a judgment as an interposed factor here would have an [28] electric effect upon a motion to stay pending before him.

The Court: He seems to have gone beyond that. He says the later suit must end. This is more than just a stay.

Mr. Tunnell: Oh, yes. That's a good point. Here our friends say, your Honor, with appeal in their voices, they have had no chance to take any depositions. They haven't had any chance to take a part in these proceedings; they haven't been afforded an opportunity to take what they call normal procedures.

Well, so what? They got a judgment. Is a person equitably entitled, after having obtained a judgment, to the exercise of discovery which he would have had had he not been successful in the meantime in some other court? It seems to us not.

Your Honor made the point which I want to cover just for a second that Chancellor Wolcott said that the case must end. That's right; we agree with that. But we don't say to your Honor you ought to end this case and say it has, by a final order, become moot, it has abated, or anything of the kind, because frankly we have appealed from these judgments in New York and it is possible, your Honor would quickly point out to us, "Well, suppose you succeed in getting these judgments reversed in New York that you now [29] point to as justifying the stay? If in the meantime you had caused an abatement of these proceedings, or maybe the statute of limitations had run, or something of the kind, you would be obtaining an inequitable advantage."

So what we are asking is not that your Honor end the case in the language of Chancellor Wolcott until and unless it appears that the Court of Appeals in New York, and maybe even the Supreme Court, if it goes there—I don't know whether it will go there—but until it has been finally decided that these judgments are final judgments, either valid and therefore with prejudice, or invalid, or valid for some purpose but not with prejudice to action elsewhere.

I am not sure what the ramifications might be of the "with prejudice" argument, but it seems to us that Chadwick against Parkhill is a good authority for our position today.

Now I would like, if your Honor will, to have Mr. Davis address the court on other aspects of this matter.

Mr. Davis: If your Honor please, I don't know that I am justified in taking up any more of the court's time in view of the way in which Judge Tunnell has presented the question, because it seems to me that this talk about duplication and discovery proceeding, or rights to discovery, [30] are completely meaningless to me in view of what has happened in the New York action.

It is true that once before, in anticipation that at some time, to us then unknown, although I must admit well predicted by Judge Bromley, as to when Judge Metzner was going to act and enter a judgment, we did argue before your Honor that in the light of the probability that a judgment was likely to be entered in the New York action fairly soon, we ought not to take up any more of the court's time here, or waste any more time or money in litigating here in Delaware.

What has happened—it happened the next day, I believe—was that what Judge Bromley anticipated, which

we knew was going to happen sooner or later but we can't actually predict when the court will act, Judge Metzner did enter a number of judgments following the decisions which he announced. I submit that those judgments are controlling on all the parties here involved until such time as the Court of Appeals reverses or modifies them.

Your Honor will recall that the last time we were here we pointed out the history of this litigation, that all this litigation started with TWA suing Mr. Hughes and the Hughes Tool Company, starting in New York, and then subsequently brought a similar action in Delaware.

[31] It has always been admitted, up until today, that the Delaware action was encompassed by the New York action. In fact, when we, on behalf of the Tool Company, sought to begin discovery proceedings in the Delaware action, and we were at that time before Vice Chancellor Short, counsel for TWA effectively convinced Vice Chancellor Short that since the New York action was proceeding apace, and merely on the ground that the New York action was proceeding there and was the first action there commenced, that the Delaware action should, insofar as our efforts to take depositions were concerned, not be permitted to continue, and the relief that Vice Chancellor Short at that time granted, if your Honor will recall, was to ~~vacate or set aside~~ our notices for the taking of the depositions in the Delaware action on the ground that the Delaware action was encompassed in the New York action.

To be sure, because of jurisdictional questions which are raised in the New York action, it could happen, depending upon what the Court of Appeals does, that there could be left some issues to be tried in the Delaware action. But until such time as the Court of Appeals acts in New York

there is no question whatever in my mind, and I don't believe that these gentlemen are claiming, or I don't believe that they could be claiming, that the New York action is not [32] finally dispositive of the rights between the parties. And what is that? With respect to the claim by TWA against the Tool Company and Mr. Hughes, the 100% owner of the Tool Company, it is to recover treble the damages which they claim TWA has suffered.

Obviously if they recover that in the New York action they can't recover anything here. It has been admitted that the Tool Company, 100% owned by Mr. Hughes, has assets well in excess even of the huge judgment which they are seeking. I believe it was referred to in this proceeding that the assets of the Tool Company, and they've got the balance sheets, are well in excess of $250,000,000, substantially in excess of that figure.

That disposes of the rights of TWA, the plaintiff.

These additional defendants are persons who are in control of TWA, the lending institutions which control TWA and who started this action against the Tool Company.

Now, the Tool Company, both in the New York action and when TWA brought the similar action in Delaware, responded with affirmative defenses and counterclaims. In essence, stripped of all the matters in which the pleadings are couched, the Tool Company has said if TWA has been damaged as you claim it is not the result of the conduct of the Tool Company but it is the result of the conduct of these [33] additional defendants. That is what the counterclaims in effect say, and set it up in the Delaware action as affirmative defenses and counterclaims.

Now, if TWA recovers what it claims it is entitled to recover as a result of what has taken place in the New

York action, and if the Court of Appeals affirms, that is the end; they can't recover anywhere else, not with respect to the counterclaims.

On the counterclaims, the Tool Company, as I said, claims that the injury, if any, or the extent to which TWA was injured by reason of these delays in financing, or acquisition of aircraft, was not by reason of the conduct of the Tool Company but was a result of the conduct of these additional defendants, these lending institutions.

But that counterclaim has been dismissed with prejudice. We opposed the dismissal of those counterclaims in the New York action. They prevailed. We opposed it being dismissed with prejudice. They prevailed on that point.

Now I don't understand what Mr. Barr or anybody else here today means when they say to your Honor, we want an opportunity to examine Mr. Hughes, unless it is indeed what seems to be somewhat apparent, to try to take advantage of a well-known factual situation with respect to the [34] availability of Mr. Hughes.

I respectfully submit to your Honor that the purpose and function of the courts of this country is not to enable any litigant to annoy and harass anyone else. They've got their judgment; they've got the dismissal of the counterclaim as they sought, with prejudice, and I respectfully submit that until such time as the New York Court of Appeals, or the Supreme Court of the United States, acts in the New York action, that matter is at an end, and there is no discovery proceeding, there is nothing else for us to do here in the Delaware action, unless your Honor wants to undertake to make some kind of a decision as to

the meaning and effect of the New York action, because if we were to proceed tomorrow what would we proceed about?

Unless this court is prepared now, and I think the answer is so simple I don't think it deserves any extended argument, but unless this court is prepared to try to make some decision as to the meaning and effect of these New York judgments, I don't know what there is left to try in the Delaware action.

But as Judge Tunnell pointed out, rather than seeking at this time a dismissal of the complaints and of all proceedings in the Delaware action, because we do not know what the Court of Appeals will do, and there is no [35] question of the position of the Tool Company that the decision of the District Court in New York is wrong and should be reversed, that upon such reversal we would be restored to the position of the factual situation which exists many times, namely, when a plaintiff deliberately elects to bring the same cause of action in several jurisdictions, the law, as I understand it, is that to the extent to which the courts in these various jurisdictions in their discretion will permit this multiplicity of actions to be commenced by a plaintiff—in this case TWA—the one which proceeds to judgment first is the one which controls all other actions. Here we have the situation where they started in New York, they subsequently started in Delaware, we defended ourselves in New York, we tried to defend ourselves in Delaware, and the New York action has proceeded to judgment.

I respectfully submit that at this point there is no need for any further action by this court other than to stay all

further proceedings until such time as the Court of Appeals, or any other appellate court, has acted, and then, depending upon the circumstances then present, entry of a further order of this court I believe to be just and equitable under the circumstances.

We recognize that the decision that the court has [36] made to the effect that the counterclaims are not to be dismissed and that the parties are entitled to examine Mr. Hughes as the managing agent, are very important questions to us, certainly. We have filed some notices to take the depositions of TWA, to which Mr. Sonnett today filed an affidavit indicating that he does not think that we should proceed in those depositions until some other questions are passed upon.

I respectfully submit that all those questions ought to be laid aside and reconsidered should, as we expect, the Circuit Court of Appeals dispose of the New York judgments in such a way as to leave something else to be tried. That is a possibility.

But until the Court of Appeals has acted to that effect, I respectfully submit that we do not have any issue which has not been adjudicated between the parties that are present here today; I should say with the possible exception of Mr. Breech. But I should say in that connection they have filed an application—it was done informally by way of a letter to Judge Metzner pointing out to Judge Metzner that in view of the basis upon which the counterclaims against the other additional defendants were dismissed with prejudice, they requested Judge Metzner to enter a similar order dismissing the counterclaims being asserted against Mr. Breech also [37] with prejudice.

Judge Metzner as of this moment has not yet acted upon that, but I think we will all admit quite frankly that Mr. Breech's position in that regard is one on which he will stand or fall. As a result, the other additional defendants who allegedly acted in concert with him, whatever relief they get will obviously become applicable to him.

I respectfully submit that we ought to give Judge Metzner an opportunity to act on this application that is now being made by Mr. Breech.

Now, Mr. Barr has made references to the history of the litigation in New York. He made a reference to the Panagra case. I don't know to what extent Mr. Barr inadvertently confused the decision of the District Court in the Panagra case, which was reversed by the Supreme Court of the United States.

However that may be, I don't think it would be particularly illuminating to this court for me to go into the reasons why in the New York action, based upon the decision of the United States Supreme Court in the Panagra case, which has been even more recently reaffirmed in the Bank case, we concluded that the issues, insofar as they involved a violation of the Federal Aviation Act by these additional defendants, were issues to be determined [38] preliminarily, if not exclusively, by the Civil Aeronautics Board.

I might add that today I was told, and Mr. Barr before the start of the day permitted me to read a copy of the order entered by the CAB today requiring all the parties to file briefs with the CAB with respect to the complaint that was filed before the CAB involving the issues involved in these pleadings with respect to our contentions that these additional defendants and lending institutions have

in fact violated the Federal Aviation Act by the manner in which they acquired control of this airline.

I respectfully submit that even though it would be appropriate to enter an order following the memorandum decision that this court has entered, that the mere entry of an order would start running the appellate time that we would have in which to act.

I respectfully submit to your Honor that in view of the judgments that have been obtained by these parties in New York, that there is no conceivable harm or injustice that could take place to freeze as of this moment all further proceedings in this litigation until such time as the New York Court of Appeals has acted and the time for further appeal or review has gone, so that we know definitively what the status is of these final judgments which were entered [39] in New York.

May I answer any questions that your Honor may have?

The Court: You say that moves the time of appeal, and that is usually the point of litigation, to keep the thing moving, the judge being impartial and as judicial as possible but interested in the progress of the litigation.

While what you say is convincing, I just don't like to see a case on dead center where there has not been a judgment in the sense that there was in the Chadwick case. That judgment is not an effective one because you have taken an appeal and are quite confident that it will be reversed.

Mr. Davis: May I submit, your Honor, that I believe the law is clear that the judgment adjudicates the rights as between the parties even though there is an appeal pending.

The effect of the judgment of the New York action is that it effectively adjudicates the rights as between the parties

until such time as the Court of Appeals modifies it or changes it.

I respectfully submit that there is at this moment in existence a judgment by a Federal District Court [40] which adjudicates the rights of the parties, which I believe this court must recognize as an effective judgment. To be sure, that judgment may be modified or reversed, but until it is, it is the judgment which is binding upon the parties here present before you.

Therefore, I don't know what we have to litigate here. There is no need from my point of view, to the extent to which we might feel aggrieved by the conclusions reached by your Honor in connection with the other matters before you, there is no earthly reason why we should be required to take procedural steps or do any work, or burden the Supreme Court of this State, to review anything which has taken place here while this judgment in New York is effective and binding upon us.

So all we really have is a procedural problem that we would be confronted with if this court should at this time take any further action in the Delaware action.

The alternative would be for us to have made an application to dismiss all the proceedings in Delaware. But had we taken this step we would have been confronted with a possible inequitable result because while I believe we are entitled to seek an order dismissing this entire proceeding in the light of this final judgment which has been entered in New York, it would be inequitable to do so [41] while there is a possibility of reversal.

It would require the parties, in the event of a reversal, to start over again. There are statute of limitation questions.

Therefore we believe that the equitable way of proceeding is to stay all further proceedings here until such time as the time when the Court of Appeals has acted, however it will act, and at that time there may or there may not be some other questions to be litigated, in Delaware or wherever else these parties may choose to go.

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Mr. Sonnett: Your Honor, may I have 30 seconds?

The Court: Yes.

Mr. Sonnett: I think it is necessary for me, since it is my first appearance before your Honor, to state something which has been said before. But as a matter of [45] personal and professional privilege, and as a matter of responsibility to the 20,000-odd minority stockholders of TWA, I would like to correct the record.

A misstatement was made to you by Mr. Davis. He knows that to be a misstatement by now, or should.

This case was filed by Trans World Airlines after its new board of directors appointed a committee to select independent counsel to investigate whether TWA had any claims or not arising out of its past history, and if so, to make recommendations.

We investigated. I did it with my assistants. We recommended the suit in New York at that time, and we gave further consideration to a suit in Delaware in due course.

The new management saw fit to approve that recommendation. The case was filed.

No additional defendant has exercised any measure of control whatsoever over my firm or me. We are acting as independent counsel for this airline. This airline has had

very, very real troubles, as your Honor noted in your opinion. It is very difficult for the airline and its 20,000 minority stockholders to disentangle themselves from the controversy between Hughes, on the one hand, and the lending institutions on the other.

[46] But the fact of the matter is that the New York case which we filed is a very different case from this case as to the violations of law charged. The only thing which might be said to be similar as a matter of law in any respect is the third cause of action in the New York case, which charges a breach of common law in the period 1961 and 1962, a non-Federal cause of action. The first two are Federal.

The second point is that the parties in the two litigations are different. The only party which is in both litigations is the Tool Company. The fact is we couldn't and can't get Hughes individually in New York. The fact is no judgment has been, is being, or will be entered against Hughes individually in New York in any action filed by TWA to date.

So this is merely a red herring. The parties are different, the causes of action are different, the relief sought is different.

Now, they urge to you that if TWA recovers substantial damages against the Tool Company in New York, that is an end to their damage claim in this case. That is simply not so. The theories of damages involved are radically different and the items of damage which will be recovered in New York remain to be seen and remain to be [47] adjudicated.

There are items of damage, your Honor, which we will be pressing in this court which are not involved in the New York case whatsoever.

But beyond and above the damage question entirely, it is this court and this court alone which is the only court in the world in which TWA has a case pending that can give TWA equitable relief against Howard R. Hughes individually, and that relief is sorely needed.

We have said from the outset of this case here, your Honor, that when Hughes was in this case as a party individually, and when his answer was in so that we knew what issues were admitted and what issues were disputed, and we knew the scope of the deposition that we would have to take of Hughes, we would then wish to examine Hughes as an individual defendant on those issues.

That has been our position from the outset. It is still our position. We do want to examine him on those matters which his answer, when filed, will establish to be in dispute. We have no wish to examine him a day longer than we have to, but we would like to get the issues defined and narrowed down before we start.

So from TWA's standpoint we urge that there be no stay and that the matter progress in the form of order which [48] we have submitted to your Honor.

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The Court: Anyway, I won't do anything. I will have to read these affidavits with more care and examine the order of the New York judge to see exactly what he did in dismissing the counterclaims. If there is to be any agreement on further procedure I will expect to hear from counsel tomorrow. I will take no action until then.

Court is adjourned.